

1 objection, except we wanted to note that the 2005
2 permits were not provided in discovery, but were
3 provided to us when we got copies, but I don't think
4 that's going to be a problem.

5 JUDGE SIPPEL: Thank you very much.

6 Then Gulf Power No. 4 is marked as
7 identification as Number 4 and is received in evidence
8 at this time.

9 (Whereupon, the document referred
10 to was marked as Gulf Power
11 Exhibit No. 4 for identification
12 and was received in evidence.)

13 JUDGE SIPPEL: Gulf Power No. 5, which is,
14 again, marked with Tab 5.

15 MR. LANGLEY: That is correct, Your Honor.

16 JUDGE SIPPEL: Thank you.

17 MR. LANGLEY: Would it be acceptable if we
18 discussed these in blocks?

19 JUDGE SIPPEL: Any way you want to do it.

20 MR. LANGLEY: We would move to admit then
21 Exhibits 5 through 9.

22 JUDGE SIPPEL: Is there any specific

1 objection to that rather than your continuing
2 objection?

3 MR. SEIVER: Five through eight, Your
4 Honor, we have no problem, and I believe they have
5 either been marked or they're parts of Mr. Dunn's
6 affidavit or we have them in exhibits. So I think
7 they'll be somewhat duplicative, but no problem other
8 than what I mentioned before.

9 Exhibit 9 is a 1978 pole attachment
10 agreement, and we'd be interested to hear from Gulf
11 Power as to the relevance of that agreement and what
12 it is going to show for this proceeding.

13 JUDGE SIPPEL: Thank you.

14 MR. LANGLEY: Your Honor, this is a 1978
15 agreement with Cox, one of the Complainants in this
16 proceeding. Mike Dunn, in his written direct
17 testimony, actually discusses this agreement. Mike
18 Dunn was at Gulf Power in 1978, and it's a good look
19 at how things worked prior to the 1978 act, which is
20 what first created this regulated rate, and so it's a
21 good historical look at the pre-regulatory
22 relationship between the parties in this proceeding.

1 JUDGE SIPPEL: All right. I've heard
2 enough on that. You know, of course, the age factor
3 does impact the document to a degree, but sure, if
4 he's going to be testifying to it and you indicated
5 what the purpose is, I'll receive that.

6 So Gulf Power's No. 5 through 9, that is,
7 5, 6, 7, 8 and 9, are identified and are marked and
8 received in evidence as Gulf Power's Exhibits Nos. 5,
9 6, 7, 8, and 9.

10 (Whereupon, the documents
11 referred to were marked as Gulf
12 Power Exhibit Nos. 5 through 9
13 for identification and were
14 received in evidence.)

15 JUDGE SIPPEL: That brings us to the next,
16 10 and 11 or 10? Your call.

17 MR. LANGLEY: Your Honor, Actually what
18 I'd like to do, and I am willing to do this however
19 you think makes the most sense, but I would like to
20 ask what the Complainant's next objection is so that
21 we're not arguing about documents over which there is
22 no objection.

1 JUDGE SIPPEL: All right. Legitimate.
2 Mr. Seiver?

3 MR. SEIVER: On Exhibit 10, Your Honor, is
4 that where?

5 JUDGE SIPPEL: Well, Mr. Langley's
6 question is starting with Exhibit No. 10 and the
7 exhibits thereafter, are there any specific documents
8 that you have an objection to, other than your
9 continuing objection?

10 MR. SEIVER: Well, Exhibit 10, one of the
11 problems that we have are handwritten notes, which I
12 am not going to challenge the authenticity of because
13 I don't think anybody has established really who made
14 the notes. In the exhibit it is said to be the notes
15 of Kyle Birch, and this is not something we have
16 examined anybody on or looked at, but to the extent
17 that there are some handwritten notes, I would think
18 that there's not going to be anything made of those
19 unless something is done that goes further.

20 I'm not sure what the relevance is of the
21 notes beyond the fact that, you know, somebody wrote
22 them on there. I can't attest to their authenticity.

1 We have not had them asked to be authentic. I'm not
2 sure what purpose they would be to be admitted.

3 JUDGE SIPPEL: Well, let's find out.
4 Let's ask counsel.

5 MR. CAMPBELL: I think there are a couple
6 of points raised there that we'll address.

7 JUDGE SIPPEL: Sure.

8 MR. CAMPBELL: The first point is the
9 authenticity of the document. If you -- do you have
10 the document in front of you, Your Honor?

11 JUDGE SIPPEL: I do.

12 MR. CAMPBELL: Tab 10? You can see that
13 it is a cover letter from Comcast, one of the
14 Complainants in the proceeding, to Mr. Mike Dunn who
15 is going to be a witness in this proceeding and who
16 has submitted prefiled written direct testimony. In
17 his direct testimony he does identify this letter as
18 coming to him from Mr. Birch with the attachment and
19 the handwritten notes from Mr. Birch.

20 And so it has been identified whose
21 handwriting it is in an effort to authenticate this
22 document. It was a file that was maintained in the

1 ordinary course of Gulf Power business. So it is a
2 business record. I don't see a hearsay problem.

3 So there's authenticity. It is not
4 hearsay. It is a business record. As far as the
5 relevance of the document, there is an issue in the
6 case with respect to Gulf Power's construction
7 specifications, and that those are communicated to
8 folks who attach to their poles. Those are contained
9 in this document.

10 We find it relevant, among other reasons,
11 but just to identify one, relevant that in this
12 contract markup that was sent back to Gulf Power that
13 there were no markups of the construction
14 specifications. That's relevant to the proceeding,
15 that they understood them, that they received them,
16 and that they did not dispute them, and so that is one
17 example of relevance, and so I think we've addressed
18 authenticity. It's not hearsay, and it is relevant
19 for at least one purpose in the proceeding.

20 JUDGE SIPPEL: Well, now you say there was
21 no objection to the construction specifications. Is
22 this a particular project or a particular pole?

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1 What's the scope?

2 MR. CAMPBELL: Yes. Mr. Dunn will testify
3 that contracts routinely sent out to the folks who
4 attach prior to the mandatory access provision in 1996
5 contained our construction specifications.

6 This was a contract that was sent to
7 Comcast in 2002 as a proposed contract, and if you'll
8 flip back to the very back, there are something called
9 construction specification plates that are C1 through
10 C11, the last 11 pages of the document.

11 And you can see that they are clean.
12 There are no markings on any of the construction
13 specifications, the inference being that the witness
14 did not disagree with any of those construction
15 standards.

16 Compare that to the remainder of the body
17 of the document, and you can just flip through and see
18 the handwritten corrections that he is suggesting or
19 requesting be made to the contract itself. Therein
20 lies at least one relevant point that we can establish
21 with Mr. Dunn's testimony authenticating this
22 document.

1 JUDGE SIPPEL: And that point being what,
2 that they have not objected --

3 MR. CAMPBELL: Yes, sir.

4 JUDGE SIPPEL: -- to these instructions?

5 MR. CAMPBELL: Yes, sir.

6 JUDGE SIPPEL: All right. I don't want to
7 dwell on that, but at most right now I find it
8 interesting, but I want to hear more on that.

9 Mr. Seiver.

10 MR. LANGLEY: Well, Your Honor, I wasn't
11 sure, and I didn't want to interrupt Mr. Campbell, but
12 he said something about the witness' statement or
13 testimony. I didn't know what witness he was
14 referring to.

15 I know Mr. Dunn will say, "This is what I
16 got from Mr. Birch, and there was nothing there."
17 That's one thing he can say, and this document, to the
18 extent that it proves that, I would think about be
19 redundant. I think by itself it really doesn't add
20 anything to the case.

21 JUDGE SIPPEL: Well, that's a different
22 issue. We're not here to discuss that today.

1 MR. CAMPBELL: And I have nothing on the
2 authenticity, and this document we had not seen until
3 Friday, and so I never got asked to authenticate whose
4 handwriting or whose notes those were, which we could
5 have done earlier if this was going to be an issue.

6 So I have no idea whether -- I do have a
7 challenge to it being authentic, whether this is
8 somebody else's. Other than Kyle Birch, this could
9 have been Mr. Dunn's or someone within Gulf Power's
10 office handwriting. I have no idea.

11 JUDGE SIPPEL: Well, there is a certain
12 element of presumptive regularity. If this was
13 received in the ordinary course of business, I mean,
14 unless you have something very specific to point to
15 and say, "Well, no, in fact, this is not his
16 handwriting," or something like that then I have a
17 concern.

18 But the idea that -- you know, I have to
19 assume that there's an element of reliability. It's
20 business documents and, you know, unless I'm shown
21 otherwise.

22 MR. SEIVER: Well, Your Honor, as long as

1 in the findings and conclusions that we proposed, if
2 we deal with something that we think is wrong in that,
3 we have the opportunity then, then I have no problem.

4 JUDGE SIPPEL: Absolutely, absolutely.

5 I'm sorry. Did we do an identification
6 and receive on that? I don't think we did. Number
7 10.

8 MR. LANGLEY: Yes, Your Honor.

9 JUDGE SIPPEL: Gulf Power No. 10 is marked
10 as Exhibit No. 10, and the objection is overruled of
11 Mr. Seiver, and it is received in evidence at this
12 time as Gulf Power No. 10.

13 (Whereupon, the document referred
14 to was marked as Gulf Power
15 Exhibit No. 10 for identification
16 and was received in evidence.)

17 JUDGE SIPPEL: Now, I guess the next
18 question you would have is are there any other tabbed
19 exhibits of Gulf Power that you have an objection to.

20 MR. SEIVER: Well, Your Honor --

21 JUDGE SIPPEL: Or what would be the next
22 one?

1 Do you see what he is trying to do? He
2 wants to -- if your next one is going to be Number 20,
3 then he wants to just move in Number 11 through 19, as
4 a hypothetical.

5 MR. SEIVER: I'm sorry, Your Honor. I
6 thought that Your Honor would be taking the statements
7 of the relevance of each exhibit, but if --

8 JUDGE SIPPEL: Yes, we'll do that. He'll
9 do that when he proffers.

10 MR. SEIVER: As far as our objections, 11
11 and 12, we will have no objections. Those have been
12 made exhibits time and time again at depositions, and
13 I have not compared them to make sure that they are
14 Exhibit 12, for example, is the same as the plates
15 that are in other exhibits, but I presume that day
16 will come and we'll find that there's something that's
17 a variation.

18 But Exhibits 13 and I believe it's up
19 through 30 were somewhat problematic only because
20 these are documents that were produced to us for the
21 first time on Friday.

22 JUDGE SIPPEL: All right. Let's take

1 those as a block, but let's right now move with 11 and
2 12. Do you understand I'm just trying to run a train
3 schedule here primarily?

4 MR. SEIVER: Very well, Your Honor.

5 JUDGE SIPPEL: Eleven and 12, there's no
6 objection to. Now, would you give me some proffer of
7 relevance, however?

8 MR. LANGLEY: We could. These both deal
9 with construction standards. Construction standards
10 are in -- they're a very important part of this case
11 because they are central to an understanding of both
12 what we contend is a crowded or full capacity pole and
13 what the Complainants contend is or is not a crowded
14 or full capacity pole.

15 I think both sides would agree that the
16 construction standards of the respective parties are
17 highly developed for that analysis.

18 JUDGE SIPPEL: Are they highly different
19 also?

20 MR. LANGLEY: The construction standard,
21 that's between Gulf and the Complainants?

22 JUDGE SIPPEL: Yes.

1 MR. LANGLEY: Not significantly, and we
2 think that's a very important point that we intend to
3 make at trial.

4 JUDGE SIPPEL: The lack of significance is
5 significant.

6 MR. LANGLEY: The lack of significant
7 difference, right.

8 JUDGE SIPPEL: You caught me well on that.
9 Okay.

10 Mr. Seiver, on that proffer of relevance,
11 I'm going to receive as marked for identification and
12 received into evidence Gulf Power Nos. 11 and 12,
13 which are identified by Tabs 11 and 12.

14 (Whereupon, the documents
15 referred to were marked as Gulf
16 Power Exhibit Nos. 11 and 12 for
17 identification and were received
18 in evidence.)

19 JUDGE SIPPEL: Okay. Now, we move into
20 what was -- direct me to the next volume, please.

21 MR. LANGLEY: We are in Volume 3, Notebook
22 3 of 5 right now, and I believe we are discussing Mr.

1 Seiver's objection to Exhibits 13 through 30, all of
2 which are contained in Notebook 3 of 5.

3 JUDGE SIPPEL: Yes. What did we take? We
4 took 11 and 12 is the first tab that shows up here in
5 this volume. So we start with Tab 13 here, correct?

6 MR. LANGLEY: Correct, Your Honor.

7 JUDGE SIPPEL: Okay. We're moving over to
8 Tab 13, and do you want to discuss these in a block?
9 Mr. Seiver, you talked about 13 through 30. Let's --

10 MR. SEIVER: Yes, Your Honor.

11 JUDGE SIPPEL: Well, let's let Gulf Power
12 make the proffer and explain what it is, and then you
13 can point out what it is that you're objecting to.

14 Mr. Campbell?

15 MR. CAMPBELL: I can make the proffer as
16 a block and then we can discuss specific objections
17 that he may have.

18 JUDGE SIPPEL: That would be --

19 MR. CAMPBELL: And if necessary we'll do
20 it document by document, but --

21 JUDGE SIPPEL: Well, let's start with the
22 general proffer.

1 MR. CAMPBELL: The general proffer, these
2 are documents that are referenced in the direct
3 testimony of Mr. Mike Dunn, again. This is similar,
4 but different in volume and extent, to the document we
5 have already admitted, which was Exhibit 10, in that
6 it deals with the types of communications that go out
7 to cable and telecommunications attachers to Gulf
8 Power's facilities concerning the standards they must
9 adhere to when attaching to the poles.

10 JUDGE SIPPEL: When you say "standards,"
11 do you mean construction standards?

12 MR. CAMPBELL: That is some of it, yes,
13 sir. Safety standards, NESC standards and Gulf Power
14 construction standards. This underpins, as Mr.
15 Langley explained, both our definition of the limited
16 nature of space on utility poles, a finite amount of
17 space on utility poles, and how that space is
18 allocated and how people are to attach.

19 It also underpins to some extent their
20 explanation of why poles are not crowded, and so I
21 think from a relevance perspective there is no
22 question that this is relevant to the proceeding.

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1 I think what I heard was the objection is
2 they just got these documents on Friday. to that as
3 a block, and again, we can deal with this on a
4 document-by-document basis, if necessary, number one,
5 many of the documents were not requested by the
6 Complainants in their discovery request in this
7 proceeding, and so, of course, they did not make their
8 way into the production because they were not pulled
9 as being responsive.

10 Secondly, there were a volume of
11 documents, and Mr. Langley has addressed this issue
12 with this Court and Mr. Seiver many times over. A
13 volume of documents was made available for inspection
14 and copying to the Complainants in Pensacola at Gulf
15 Power's headquarters and various locations there in
16 Pensacola. Many of these documents were in that set,
17 and they didn't flag them for copying, but we did, and
18 so that explains why they haven't received them.

19 And I don't believe I've heard any other
20 objections. So I'll stop there and defer to Mr.
21 Seiver.

22 JUDGE SIPPEL: Well, did they know the

1 documents that you were flagging for copying or this
2 was done --

3 MR. CAMPBELL: Oh, no. Mr. Langley can
4 explain that better than me, but the documents were
5 volumes of documents that were made available for them
6 to come in and inspect and copy.

7 JUDGE SIPPEL: Yes, I remember that.

8 MR. CAMPBELL: They came in and did that
9 and identified a subset of documents that they want to
10 copy. Well, of course, we were doing that as well,
11 and we continued our review even as we were drafting
12 testimony, looking at all of these boxes of documents
13 to decide, oh, yeah, this is important, and this is
14 important and this is important.

15 We took the opportunity to do that, and
16 these documents were polled as being relevant to Mr.
17 Dunn's testimony that he has submitted in the case,
18 that he is available to take cross examination on, and
19 again, these are business records that come from Gulf
20 Power's files.

21 So the reliability is there. I don't
22 think there's an authenticity problem, and many of

1 these documents are historical perspective of what has
2 happened between Gulf Power and the cable Complainants
3 and other companies.

4 JUDGE SIPPEL: Do you want to add anything
5 to that, Mr. Langley, on the timing or is that
6 basically it?

7 MR. LANGLEY: No, I believe Mr. Campbell
8 has explained that. I mean, a lot of this that as we
9 were working with Mike Dunn in the preparation of this
10 direct testimony he said, "Oh, well, there's such-and-
11 such," and in fact, there was such-and-such.

12 So we have included it all in the exhibits
13 that were sent out last week.

14 JUDGE SIPPEL: We are talking about this
15 13 through 30 at this point. Mr. Seiver.

16 MR. SEIVER: Your Honor, this points up
17 one of the problems we had in discovery. Yes, we had
18 rolling cards with files and we were directed that
19 there were file cabinets available at various offices,
20 and we thought that that was inappropriate for us to
21 cull through to find out what they were relying on,
22 but we asked specifically from the description of

1 evidence.

2 You know, you described evidence when they
3 did the description, when they itemized it and said
4 this is what we've got that will prove our case under
5 APCo, and we said, "Well, show us that."

6 And we got this entirety of I don't know
7 how many tens of thousands if not hundred thousands of
8 pages of files made available. We went and looked and
9 tried to pull what we could in the two days that were
10 spent down there, but I did not have any idea as I
11 turned the page whether, oh, they're going to rely on
12 this or not rely on this. That's in their control,
13 and it's obvious that subsequently they did do this
14 review and pull out the documents from these tens or
15 hundreds of thousands of documents of what they're
16 going to rely on, which I'm not pressing it. I
17 couldn't figure out that this is something Don would,
18 and our objection we had before in the discovery
19 process was that they can't have this as responsive to
20 discovery and put the onus on us to figure out what
21 they're describing and what they're relying on.

22 JUDGE SIPPEL: Well, these documents were

1 delivered last week?

2 MR. CAMPBELL: That's correct.

3 MR. SEIVER: Yes.

4 JUDGE SIPPEL: And we don't have the first
5 day of hearings until the 24th. I mean, you're going
6 to have a considerable period of time by the time if
7 Mr. Dunn is going to be the primary loquitur of this,
8 and you know, you'll have an opportunity.

9 MR. COOK: Yes. Your Honor, I would just
10 make the point of fairness, that when you get
11 documents on the last business day before the
12 admission session and after the testimony is dues to
13 final, that means that none of our fact witnesses,
14 none of our expert witnesses has had a chance to
15 review this.

16 We're at a point now where we have two
17 weeks to prepare for cross examination and to submit
18 our trial brief, and as a matter of fundamental
19 fairness, it is unfair for them to essentially give
20 you the hard copy of something right before the
21 admission session and say, "Oh, here it is. We were
22 preparing our stuff, and we thought it was relevant."

1 What would have been fair is to give us a
2 copy of it a couple of weeks, at a minimum, in advance
3 of the March 31st filing date. But this we think, in
4 fairness, is too late.

5 JUDGE SIPPEL: You know, there's no sense
6 in going back and forth on this. I hear you. I would
7 have liked to have seen it done differently, but let's
8 just push forward, and I ask you. I'm sure you will.
9 I just have this feeling that you're going to be able
10 to handle this. I mean, you know, this is not a dead
11 man's dying declaration or something like this. This
12 stuff, it seems to me, is pretty cut and dry by the
13 people who are familiar with the territory.

14 MR. SEIVER: Well, Your Honor, I'll just
15 add in then that our continuing objection to these
16 documents is that they weren't produced in discovery.
17 They should be excluded, and we'll brief that and make
18 that an issue for Your Honor.

19 JUDGE SIPPEL: And I want you to know that
20 I am very familiar with Pensacola, the whole Pensacola
21 chapter of the pre-hearing, pre-trial on this, and I
22 was very much involved in terms of reading and writing

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1 about it, and it never has made me feel too good.

2 But I've been on this side. As a young
3 lawyer I was on that side of having, you know, what
4 you're describing, and it's not -- it's a very
5 uncomfortable feeling.

6 I can't go beyond that right now.

7 MR. SEIVER: Your Honor, I'm not sure what
8 the purposes are, but the first three Exhibits 13, 14
9 and 15 are exhibits we may want to use in cross
10 examination, but I didn't know how they worked into
11 this case because they're communications with three
12 entities that are not at issue, I thought, in this
13 case: Americable and B&L Cable Communications. I'm
14 not sure what the relevance of those are.

15 JUDGE SIPPEL: Mr. Campbell?

16 MR. CAMPBELL: I need to address two
17 points there. One, I can't let a statement stand on
18 the record that says they were not produced during
19 discovery. They were. They don't like the matter of
20 production. That is a different animal.

21 But it was produced consistent with the
22 rules, and that is that they were made available for

1 inspection and copying. That they chose to spend only
2 two days in Pensacola to review this volume of
3 documents is a strategic decision that they made, not
4 us, and so they were produced to the extent that they
5 were responsive.

6 And as I've said, some of them were not
7 responsive to discovery requests. As for the first
8 three documents, and this is an example of some of the
9 others, what is at issue in this proceeding is not
10 just the Complainants' attachments to our poles. What
11 is at issue in our proceeding is our poles, the nature
12 of our poles; that there is a finite amount of space
13 and how that space is allocated; that we have some
14 correspondence that is relevant to that that relates
15 to an attachment other than Complainants I don't see
16 as making that document irrelevant in this proceeding.
17 So it's relevant for that reason alone, among others.

18 MR. SEIVER: Your Honor, I guess I must
19 have missed something. I don't know how this is
20 relevant to whether or not a particular pole is at
21 full capacity or a particular opportunity was lost.
22 You know, that has been kind of at the root of the

1 relevancy issue here.

2 If it had something to do with that, and
3 I think earlier if we go back through the orders, Gulf
4 Power had represented they did not have a pole-by-pole
5 analysis of what is full and what is not full or
6 anything on lost opportunity, and in fact, Your Honor
7 indulged by ordering the survey so something could be
8 done at least currently, and the survey, of course,
9 was not completed. It was done only on some of the
10 poles in Pensacola. I don't have any idea whether
11 these relate to the poles that were actually surveyed
12 in Pensacola, and I don't know whether these have
13 anything to do with a lost opportunity, if that is
14 what they are arguing, but that seemed to me the two
15 touchstones.

16 Construction standards? Yes. I mean,
17 people talk about how poles are designed and built,
18 but communications with others did not seem to really
19 fit into, well, is that pole full or not full, or was
20 there an opportunity on that pole that was lost or not
21 lost?

22 JUDGE SIPPEL: Well, I hear you, and I

1 think, you know, you're raising good points, but I
2 mean, I've heard the proffers. It is a reasonable
3 proffer under the issue in this case, and I'm going
4 to, if that's an objection, I'm going to overrule it.
5 I'm going to receive this into evidence.

6 So can I rule on 13 through 30 now?

7 MR. CAMPBELL: From our perspective you
8 certainly may.

9 JUDGE SIPPEL: All right. Mr. Seiver?
10 I'm not asking you to agree with the ruling. I'm
11 simply saying you have nothing more to add on 13
12 through 30?

13 MR. SEIVER: No, Your Honor, I do not.

14 JUDGE SIPPEL: Thank you.

15 Then as identified by tabs in Gulf Power's
16 Notebook 3, the documents numbers 13 through 30 are
17 hereby marked for identification as Gulf Power's
18 Exhibits No. 13 through 30 and are received in
19 evidence at this time as Gulf Power's Exhibit 13
20 through 30, subject, of course, to Mr. Seiver's
21 objections.

22 (Whereupon, the documents

1 referred to were marked as Gulf
2 Power Exhibit Nos. 13 through 30
3 for identification and were
4 received in evidence.)

5 JUDGE SIPPEL: Okay. Your next grouping?

6 MR. LANGLEY: Your Honor, I don't know if
7 there is a great way to group these, and so what I
8 would do is move for the admission of the remainder of
9 our exhibits and as Mr. Seiver to identify the next
10 one that has an objection to.

11 JUDGE SIPPEL: Well, why don't we stay
12 with this notebook and let's work on 31 through 46?
13 That's kind of arbitrary, but that's in this
14 particular notebook. Is there any clarifying
15 objection that you have to any of these specific
16 tabbed documents?

17 MR. SEIVER: I always like that question
18 in a deposition. Is there anything else that you want
19 to tell us that you haven't told us, right?

20 Your Honor, thank you. If I could do it
21 just one at a time, Exhibit 31 is the Alabama Power
22 case, which we also have as an exhibit in our -- we